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IN THE

Supreme Court of the United States

KENTUCKY ASSOCIATION OF HEALTH PLANS, INC., *et al.*,
Petitioners,

v.

JANIE MILLER, COMMISSIONER OF THE KENTUCKY DEPARTMENT OF INSURANCE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The decision of the Sixth Circuit in this case exacerbates a split in the federal circuits, and conflicts with a decision of this Court, over a question that goes to the very heart of the continuing national debate over the use of managed care systems to bring the spiraling costs of health care delivery under some control, without risk to the quality of care provided. As the petition explains, health maintenance organizations ("HMOs") and other managed-care entities have determined that they can serve both goals simultaneously by creating limited networks of providers, whose fees are lower because of the exclusivity of their access to HMO beneficiaries, and whose care quality can be more closely monitored because of the limited network size. The problem is that many states – including Kentucky – have enacted statutes prohibiting the provider network limitations on which the cost and quality benefits depend, requiring that HMOs cast open their networks to any provider willing to meet the network terms. This case squarely presents the question whether such statutes are valid or are preempted by federal law.

Respondent does not seriously dispute the importance of the issues raised in this case. Instead, respondent seeks refuge entirely in efforts to deny the conflicts in the courts by distinguishing the decided cases. Those efforts are unavailing. At bottom, respondent's brief only confirms the sharp divisions among the courts on the important question presented here and, consequently, the urgent need for review.

I. THE CIRCUITS ARE DIVIDED OVER THE FEDERAL PREEMPTION OF AWP LAWS

As the petition demonstrates, the Sixth Circuit's decision in this case that the Kentucky AWP laws are not preempted by the Employee Retirement Income Security Act of 1974 ("ERISA") because they are not laws "which regulate insurance," 29 U.S.C. § 1144(b)(2)(A), follows a decision of the Fourth Circuit upholding a Virginia AWP law against an ER-

ISA preemption challenge, and conflicts with decisions of the Fifth and Eighth Circuits rejecting AWP laws in Louisiana, Texas and Arkansas. *See* Pet. 12-15. Respondent concedes that Kentucky's AWP laws "function in the same manner" as the Virginia statute reviewed by the Fourth Circuit in *Stuart Circle Hosp. Corp. v. Aetna Health Mgmt.*, 995 F.2d 500 (4th Cir.), *cert. denied*, 510 U.S. 1003 (1993), Resp. Br. 15, but argues that the AWP laws invalidated by the Fifth and Eighth Circuits are distinguishable. The "distinctions" on which respondent relies are, however, trivial at most, and often simply incorrect.

Attempting to distinguish the Eighth Circuit's decision in *Prudential Insurance Co. v. National Park Medical Center*, 154 F.3d 812 (8th Cir. 1998), respondent relies on the observation of the majority below that the Eighth Circuit "found that an Arkansas AWP provision did not meet the common sense test because, in part, its scope included 'employers and administrators of self-insured plans' (although the statute excluded self-funded ERISA plans)." Resp. Br. 6 (quoting Pet. App. 27a). "Unlike Arkansas' statute," respondent contends, "Kentucky's statutes are limited to entities that assume financial risk." *Id.* at 7.

That contention is baffling: Kentucky's AWP laws are not at all "limited to entities that assume financial risk," but apply to "self-insurers who are not protected by ERISA's deemer clause," as even the majority opinion below recognized. Pet. App. 26a. Indeed, contrary to respondent's assertion, the majority opinion below does not point to the application of Arkansas' AWP law to self-funded non-ERISA plans for the purpose of *distinguishing* that law, but rather to explain its *disagreement* with the Eighth Circuit's analysis of the Arkansas law. Immediately after reciting the Eighth Circuit's conclusion that the application of the Arkansas law to self-funded plans renders the law preempted (in the passage quoted by respondent), the majority opinion *rejects* the conclusion (in a passage omitted by respondent): "we do not believe that inclusion of self-insurers not protected by the deemer clause, as well as purchasers of insurance, within the statute's reach in itself removes the statute [from the saving clause]." Pet. App. 27a. The conflict between the decision below and the Eighth Circuit's decision in *Prudential Insurance* is inescapable.

Turning next to the two Fifth Circuit decisions cited in the petition, *Texas Pharmacy Association v. Prudential Insurance Co. of America*, 105 F.3d 1035 (5th Cir.), *cert. denied*, 522 U.S. 820 (1997), and *CIGNA Healthplan v. Louisiana*, 82 F.3d 642 (5th Cir.), *cert. denied*, 519 U.S. 964 (1996), respondent suggests that these decisions are "legally and factually distinguishable" from the decision below. Resp. Br. 8, 9. Respondent is wrong on both counts.

Respondent asserts that the opinions are "legally distinguishable" from the Sixth Circuit's opinion because the Fifth Circuit cases both "failed to apply the 'common sense test,'" Resp. Br. 8, 9, and instead applied only the third McCarran-Ferguson factor – *viz.*, whether the law is limited to entities within the insurance industry – to invalidate the Texas and Louisiana AWP laws. Resp. Br. 8-9. It is true that *CIGNA Healthplan* and *Texas Pharmacy* were decided before this Court made clear in *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 373 (1999), that a law need not satisfy every McCarran-Ferguson factor. But there is no basis for questioning the continuing vitality of the decisions after *UNUM*. Respondent overlooks the fact that, under this Court's precedents, a conclusion under the third McCarran-Ferguson factor that a law is not one that regulates insurance because it regulates entities outside the insurance industry "would compel the same conclusion under the common-sense [test] as well." Pet. 15-16 n.6 (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50 (1987)). More to the point, respondent also overlooks the Fifth Circuit's recent statement

of that very conclusion in *Corporate Health Ins., Inc. v. Texas Dep't of Ins.*, 215 F.3d 526 (5th Cir. 2000), *petition for cert. filed*, No. 00-665, 69 U.S.L.W. 3317 (Oct. 24, 2000), in which the court not only observed that "[t]he common sense test measures whether the law is specifically directed toward the insurance industry," *id.* at 538, but invoked that principle to reaffirm *Texas Pharmacy* and *CIGNA Healthplan*, *id.* at 538 & n.51. *See also* Pet. 15-16 n.6. *Corporate Health* simply leaves no doubt about the controlling force of *Texas Pharmacy* and *CIGNA Healthplan* in the Fifth Circuit, even after *UNUM*.

Respondent also contends that the Fifth Circuit AWP decisions are "factually distinguishable" from the decision below, in that the Louisiana and Texas AWP laws applied to non-insurance entities. Respondent attempts to distinguish the Louisiana statute at issue in *CIGNA Healthplan* on the ground that it "regulate[d] entities clearly outside the insurance industry (*i.e.*, self-funded organizations and employers)." Resp. Br. 9. But the Kentucky laws, as we have seen, *also* regulate "entities clearly outside the insurance industry" – *i.e.*, self-funded organizations and employers not governed by ERISA. Thus, on respondent's own view of the key material fact in *CIGNA Healthplan*, the analysis and result of the decision is irreconcilable with the decision below.

As to *Texas Pharmacy*, respondent merely notes that the opinion focuses primarily on the Texas law's application to "HMOs and PPOs acting as administrators of an employer's self-funded plan." Resp. Br. 8. According to respondent, Kentucky's laws are distinguishable because they do not apply to HMOs and PPOs acting only as plan administrators. *Id.* But even assuming that were true,[1] it does not suffice to

[1] In fact, the Kentucky laws apply in terms to all HMOs and PPOs, with no exemption for those engaged solely in administrative services. *See* Pet. App. 42a-43a (Kennedy, J., dissenting).

distinguish the Texas statute, which operated precisely the same as the Kentucky laws in respect to *employers*, exempting only those that were subject to ERISA, *see Texas Pharmacy*, 105 F.3d at 1037, leaving non-ERISA self-funded employers subject to its AWP requirements. Though the court did not focus on that aspect of the statute, the inclusion of such employers plainly would have been enough to hold the law preempted under Fifth Circuit law – as the court subsequently reaffirmed in *Corporate Health*. *See* 215 F.3d at 538 (state law falls outside the saving clause if it covers entities "not engaged in insurance practices," including "employers"). By contrast, the Texas statute just as plainly would *not* be preempted under the decision below, demonstrating an irreconcilable conflict between the opinions that only confirms the case, already well-established by the conflicts discussed above, for certiorari review.

It should be clear, finally, that we are not asking this Court to "treat all AWP statutes the same." Resp. Br. 16. It is inherent in the judicial power that a case may be decided only on the particular facts before the Court, and thus the circuits each have of course "considered separate and distinct AWP statutes." *Id.* But as the petition already observed, while there may be "certain differences in the wording of the AWP statutes at issue in the decided cases . . . the statutes are all essentially the same in operation and effect." Pet. 16. Respondent's failed efforts to identify any meaningful distinctions only substantiates the point. The simple fact is that Kentucky's AWP laws are in no way unusual or extreme; they are "heartland" AWP statutes, and they give this Court an ideal vehicle for resolution of the nationwide controversy over the validity of AWP laws.

II. THE CIRCUITS ARE DIVIDED OVER THE SUBSTANTIVE CONTENT OF A KEY ELEMENT IN THE SAVING CLAUSE INQUIRY

As the petition explained, this case would also provide an opportunity to resolve a conflict in the courts over an important principle that governs the ERISA preemption/saving clause inquiry – not just in the AWP context, but in every other context implicating the saving clause. Respondent misapprehends our argument on this point, and thus fails to refute either the existence of a conflict or the reason it counsels in favor of certiorari.

The argument raised in the petition was that the circuits are divided in their analysis of the first McCarran-Ferguson factor as it applies in a variety of saving clause contexts – *viz.*, whether the practice regulated has the effect of transferring or spreading an insurance policyholder's risk, which the Court has labeled "an indispensable characteristic of insurance." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 212 (1979). The Fourth and Sixth Circuits, we explained, each took an expansive view of the meaning of "risk-spreading" in their respective AWP decisions, holding that AWP laws regulate insurance in part because they shift away from the insured the cost of care from a provider that is not included in the "insurer's" network. *See* Pet. 17. The Tenth Circuit has taken a similarly broad view in a related context, *id.*, whereas decisions by the Ninth and Eleventh Circuits in other saving clause cases have explicitly held that a law regulates the "spreading" of "risk" under this McCarran-Ferguson factor only when it affects the risk of needing care for a *particular injury*, not the cost of obtaining care from a *particular provider*, *id.* at 18.

Respondent's principal response is to argue that the Ninth and Eleventh Circuits applied their narrow analysis of the McCarran-Ferguson risk-spreading factor to non-AWP statutes "that are distinguishable from Kentucky's AWP

statutes." Resp. Br. 12; *see id.* at 10-12. But that is precisely *our* point, which respondent has missed: the disagreement in the opinions below over the critical risk-spreading factor as applied to AWP laws actually reflects a more fundamental disagreement in the courts over the substantive meaning of that factor, which has arisen in other saving clause contexts as well. The fact that a key issue implicated in the saving clause analysis of AWP laws has consequences in other contexts simply demonstrates the broader legal importance of this case. And the opportunity "to provide further guidance as to the nature of the risk-spreading factor," and to help "clarify the resolution of saving clause issues that arise in respect to a variety of state health care regulatory statutes," Pet. 19, is all the more reason the Court should address the basic AWP preemption conflict presented here.[2]

III. THE DECISION BELOW CONFLICTS WITH A DECISION OF THIS COURT

In *Royal Drug*, this Court held unambiguously that a contract between an insurer and a third-party provider was *not* part of the "the business of insurance" under the McCarran-Ferguson Act. *Royal Drug*, 440 U.S. at 214-15; *id.* at 243 (Brennan, J., dissenting). The majority opinion below applies the very same McCarran-Ferguson factors first identified in *Royal Drug*, *see Union Labor Life Ins. Co. v. Pireno*, 458 U.S 119, 129 (1982) ("*Royal Drug* identified

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[2] Respondent's only other argument on this point is that "a division over one factor of the McCarran-Ferguson test does not warrant granting certiorari," because not every factor need be met in every case. Resp. Br. 12-13. But we have not suggested that a division over one factor would be sufficient in and of itself to warrant review. Our point is simply that the importance of this case extends beyond the AWP law context, and that this case presents a potential opportunity to contribute clarity to related ERISA saving clause contexts, which are *additional* reasons why the conflict over AWP laws merits review.

three criteria relevant in determining whether a particular practice is part of the 'business of insurance'"), but reaches the opposite conclusion: that petitioners' contracts with the third-party providers *are* the "business of insurance" under McCarran-Ferguson and, consequently, Kentucky's law regulating those contracts is a law which regulates insurance.

Respondent suggests two reasons why the decision below does not conflict with *Royal Drug*. Both are meritless.

First, respondent asserts that while "one can argue that the agreements in *Royal Drug* did not concern the policyholder, one cannot argue the same for Kentucky's AWP statutes." Resp. Br. 15. This is so, respondent continues, because "[a]ccess to qualified healthcare providers through insurers is of vital concern to consumers." *Id.* That argument is a non sequitur. No matter how important consumers may think "access to qualified healthcare providers through insurers" is, that has nothing whatsoever to do with whether a law that regulates *insurers' third-party provider contracts* is a law that regulates *insurance* under McCarran-Ferguson. This Court held in *Royal Drug* that third-party provider contracts are not "the business of insurance," and neither respondent nor the majority opinion below has explained what distinguishes the third-party provider contracts at issue in *Royal Drug* from those regulated here.

Second, respondent goes so far as to suggest that because *Royal Drug* was an antitrust case under the McCarran-Ferguson Act, "it is not clear that *Royal Drug* can 'be transferred to the ERISA preemption context at all.'" Resp. Br. 15-16 (quoting *American Drug Stores, Inc. v. Harvard Pilgrim Health Care, Inc.*, 973 F. Supp. 60, 72 (D. Mass. 1997)). That argument cannot be taken seriously: it has long been settled that this Court will advert to the three McCarran-Ferguson factors in determining whether a law is one "which regulates insurance" for purposes of the ERISA preemption saving clause. *See UNUM*, 526 U.S. at 267; *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 48-49 (1987). Those factors were, of course, first identified in *Royal Drug* itself. *See supra* 7-8. Inasmuch as this Court *itself* has transferred the McCarran-Ferguson principles enunciated in *Royal Drug* to the ERISA preemption context, it is simply incorrect to suggest that *Royal Drug* cannot be "transferred to the ERISA preemption context."

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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